PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
Business Meeting
March 6, 2006
Department of Environmental Quality
Metcalf Building Room 111, 1520 East 6th Avenue
Helena, MT

Members in attendance were Thomas Bateridge, Theresa Blazicevich, Frank Boucher, Greg Cross, Roger Noble, Shaun Peterson, and Frank Schumacher. Also in attendance were Terry Wadsworth, Executive Director, and Paul Johnson, Board attorney.

Presiding Officer Cross called the meeting to order at 10:05 a.m.

Approval of Minutes

Mr. Boucher moved to accept the minutes of the January 9, 2006 Board meeting as written. Mr. Peterson seconded. **The motion was approved.** Mr. Bateridge abstained.

Town Pump, Dillon - Fac ID #01-08695, Rel. #4144 – Final Order

Mr. Wadsworth provided a brief summary of the status of this Montana Administrative Procedures Act (MAPA) proceeding. The proposed Final Order, which was included in the Board's packet and is now before the Board, adopts the Hearing Examiner's Proposed Order Granting the Board's Motion for Summary Judgment and Denying Town Pump, Inc's Cross Motion for Summary Judgment, with some modifications. In part, the order states that the Board should apply the law in effect at the time the release was discovered, and that Town Pump failed to provide timely notification as required by law or rule.

Mr. Pat Fleming, attorney for Town Pump, addressed the Board. He argued against the Board adopting the Final Order as proposed. Mr. Fleming based his arguments on the contention that Town Pump reported the release within 24 hours, and that the enabling statute, §75-11-308, MCA, does not mention a requirement to report unusual operating conditions. That requirement is in the administrative rules. As well, there is no evidence the public was informed that "unusual operating conditions" means "any alarms." In addition, he believes there were no unusual operating conditions. The facility had just been constructed and was in its "shakedown" phase. A representative of the installer visited the site and testified there was no evidence of a release when he investigated the alarms. Town Pump, on its own initiative, performed calculations to determine whether product had been lost, and when a discrepancy was discovered, called in a suspected release immediately. There was no intentional violation of law or the reporting requirements.

A second basis for finding Town Pump eligible is that the legislature changed the law in 2003. After the change there are only two eligibility requirements, and Town Pump satisfied both. The legislation went into effect in October 2003 and Town Pump made their application for the 2002 release in December 2003, after the law took effect. The hearing examiner proposes that the Board confirm that the old law was violated and that the new law is totally inapplicable to Town Pump. Mr. Fleming believes the Board should apply the intent of the legislature, which was to get rid of a bad rule, and grant Town Pump eligibility.

Mr. Wadsworth stated that §75-11-308, MCA (2001), the eligibility statute applicable to this matter, had several components to it. One was a requirement to notify the DEQ. Another was to be in compliance with applicable laws and rules. The "applicable laws and rules" component points to ARM 17.56.326, containing release reporting requirements that include 24-hour, 7-day, and unusual operating condition reporting requirements. The 2003 legislative changes removed the reporting requirements from §75-11-308, MCA (the eligibility statute), but not from §75-11-309, MCA (the reimbursement statute).

Mr. Johnson, Board's counsel, stated that the Board's grounds for denying the release were that Town Pump had failed to report unusual operating conditions. The unusual operating conditions were that there was free diesel fuel that leaked out of the supply system into a containment sump, and in association with the leak, several sump alarms were registering. Town Pump requested a contested case (MAPA) proceeding. A hearing examiner was appointed, discovery and a hearing were held, and the hearing examiner issued his decision. His decision precisely confirmed the bases for the Board's denial in January 2005. The first part of the decision was that the Board must apply the rules and laws that are in effect at the time the release was discovered in determining whether an owner or operator is in compliance with the law sufficiently to justify granting eligibility for participation in the Fund.

Mr. Peterson asked for confirmation that the hearing examiner found the 2003 amendments to the law were not retroactive, and that unusual operating conditions are considered a suspected release.

Mr. Johnson replied that Town Pump appears not to recognize this key distinction in the Board's original decision. What was required in December 2002 was a report to DEQ of unusual operating conditions, not a confirmed release. The Department had long construed "unusual operating conditions" broadly, including sump alarms going off. In this case there was a good deal of uncontested evidence that on December 10 the manager had examined the sumps because alarms were ringing, found free diesel fuel in the sump beneath the diesel fuel dispenser, discussed the matter with Town Pump headquarters, and that alarms sounded repeatedly over the next two days. The Board's position has been that you cannot consider free diesel fuel filling up a sump, or alarms going off repeatedly, as a usual operating condition.

The hearing examiner ratified the Board's practice of applying the laws and rules that were in effect at the time of discovery of the release to determine eligibility compliance. He also ratified the Board's determination that Town Pump was not in compliance with those statutes and rules for eligibility purposes, and this release is therefore ineligible to participate in the Fund. He recommended the Board adopt the hearing examiner's proposals. The proposed final order, as presented, adopts the hearing examiner's proposals.

Mr. Fleming stated that Town Pump relied on the expertise of Mr. Griffin from Northwest Fuels, who had come out to the site, took corrective action and advised Town Pump the problem was taken care of. Mr. Griffin did not believe there was a release or unusual operating conditions and did not advise Town Pump to call in to DEQ. The daily inventory reports showed no discrepancy. But when the Technical Assistance Group asked the manager if there was anything unusual, the manager performed a more detailed calculation against sales and discovered several hundred gallons was missing. This was evidence that there might have been a release, though the release was not discovered until later.

Mr. Schumacher noted that Mr. Fleming had said this was a new system and that alarms sounding was part of the startup procedure. He then asked if repeated alarms would not raise concerns with the Technical Assistance Group, even though it was a new system. The alarms were certainly put in for a reason.

Mr. Fleming agreed that it would and did. His position is that Mr. Griffin was at the site examining the system, repairing any difficulties that he saw, and telling Town Pump that the problems were resolved. Therefore, Town Pump thought the system had been fixed.

Mr. Schumacher asked whether a quicker response could have averted the release, and what the magnitude and location of the actual release was.

Mr. Fleming responded that quicker response would not have prevented the release, which was approximately 500 gallons, after recovery of free product.

Mr. Johnson indicated that the diesel product entered the soil from the unleaded tank sump, after having flowed through the containment piping and a series of sumps.

Mr. Wadsworth added that more than one sump had contained diesel fuel, more than one alarm had sounded, and that Mr. Griffin had only looked at one sump. The sump Mr. Griffin examined is not necessarily the one for which an alarm sounded.

Mr. Fleming replied that the alarm that sounded was for the sump that was investigated. There is no evidence in the record establishing that all the sumps were full or that reporting the matter sooner would have mitigated the effects of the release. He also indicated that Mr. Griffin disavowed most of his deposition, indicating that his supervisor wrote the statement, and he just signed it.

In response to a request from Presiding Officer Cross, Mr. Johnson explained the Board's options for action, stating that the hearing examiner has issued two proposed orders that are up for adoption by the Board. The first is an order granting the Board's motion for summary judgment in the MAPA proceeding. The second is a proposal for decision to resolve the contested case proceeding, titled Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order. Both Town Pump and the Board staff filed exceptions to that document. The Board staff and Mr. Johnson recommend that the Board accept the staff's recommended changes to that document, reject Town Pump's exceptions and adopt as its final order the hearing examiner's proposal, as modified by the Board staff's exceptions.

Mr. Fleming contended that the Board is vested with the authority to rule on Town Pump's application. It can reject the findings of fact and deem Town Pump eligible. It is the Board's decision, not the hearing examiner's decision.

Mr. Johnson disagreed with Mr. Fleming's understanding of the law. Under MAPA, the Board can adopt the hearing examiner's findings of fact, but can change them only if each member who votes on the matter has reviewed the entire record that went before the hearing examiner. If the Board decides to overrule the hearing examiner's legal conclusions, there is more latitude to do so. He pointed out that the legal bases the Board used to make its decision in 2005 are the precise legal bases employed by the hearing examiner in making the current ruling.

Mr. Boucher moved to accept the final order as presented in the Board's packet, with all due consideration to the information that was provided during the meeting. Ms. Blazicevich seconded. **The motion was unanimously approved**.

Mr. Peterson asked if two motions were necessary. Mr. Johnson replied that the order provided in the packet addressed both issues and acceptance of the final order as presented was all that was necessary.

Mary Hightower Property – Fac ID #56-14109, Rel #4274, Silver Gate - Eligibility

Mr. Wadsworth gave a summary of the chronology at the site. The tanks were last used in 1985. The Hightowers purchased the property in August 1985, and knew about the tanks at that time. Federal law provided a ten year period to remove or close out-of-service tanks. In 1997, EPA Administrator Browner issued a notice that EPA would not grant an extension of time to comply with the law, since there had been an extensive public notice and education program concerning compliance with the law. Given the extensive public notice and the ten year period the Hightowers should have had knowledge of the federal law, and ample time to remove or close the out-of-service tanks and comply with the Federal law. In April 2003, the Park County Environmental Council notified DEQ that the tanks had probably not been removed, and DEQ sent a letter to the owner. In June 2003, DEQ inspected the property, noting the presence of piping, dispensers, vent piping and probable tanks. In August 2003, the removal permit was issued for two tanks. Several tanks were removed in September 2003, and the release was discovered. In March 2005, the Hightowers applied for eligibility. The staff recommended the release be ineligible, due to violation of the law to remove or properly close the tanks or comply with requirements for active tanks.

Lee Bruner, attorney for Mary Hightower, addressed the Board. He stated that there is no dispute on the facts in this matter. The tanks were pumped out and closed in June, 1985. At the time, there were no regulations on how to close a tank. The federal regulations putting special requirements on closed tanks were adopted in 1989. There is a State regulation (ARM 17.56.704(1)) that requires an owner/operator to perform additional work on previously closed tanks, if required by DEQ. Once Mrs. Hightower was told to remove the tanks, she did so as promptly as possible. The allegation that Mrs. Hightower was dilatory in her responsibility to remove the tanks is without merit.

Mr. Bruner noted that, at a previous meeting a Board member asked Dennis Franks, the consultant on the site, if the tanks were empty. Mr. Bruner reiterated Mr. Franks' professional opinion that all the tanks were pumped out when they were closed, though some of the tanks had rusted through and contained water that had infiltrated the tank. The tanks were in compliance at the time they were pulled. Mary Hightower should be eligible, she had tanks that were properly closed in 1985, there was no requirement that she do anything else, and when asked to removed them, she got a proper permit to pull the tanks. When the tanks were pulled contamination was found and called in within 24 hours.

He noted that the staff recommends denial of eligibility on the basis of §75-11-308(1)(e), MCA, because the tanks do not comply with monitoring and corrosion protection and other provisions of ARM 17.56.XXX. However, the tanks were taken out of service in June 1985 and therefore were not subject to those requirements. The Board has historically granted eligibility to these types of tanks.

Mr. Bruner noted that in previous appearances before the Board the staff has recommended denial of eligibility based on Montana laws and rules. The staff now cites national regulations requiring spill and overfill devices, 40 CFR Parts 280 and 281. Mr. Bruner presented 40 CFR 280.73, addressing tanks closed prior to 1989. This provision is identical with Montana law.

Mr. Peterson asked if there was any dispute that the tanks were properly closed in 1985.

Mr. Bruner said there were no black and white rules on how to close tanks in 1985. There was nothing that said specifically how to close tanks.

Mr. Noble stated that, to his knowledge, the two methods of closing a tank are to fill it with inert material or to remove it. He noted that leaving a tank empty is not an accepted practice.

Mr. Bruner remarked that currently that is true. But prior to 1989, that was not true.

Bill Rule, Underground Storage Tank Section, stated that the UST Section also disagreed that the tanks were properly closed. In 1985 the Uniform Fire Code adopted in 1973 would be the regulations that applied to tank closure.

Presiding Officer Cross requested clarification that the issue is whether or not the tanks were properly closed relative to the law of the day, and the applicable law is the law that went into effect September 8, 2003.

Mr. Johnson said the issue is whether, at the time the release was discovered, the tanks had been properly closed.

Mr. Bruner agreed. The question is whether they were in compliance with the law, and the relevant law is that for previously closed tanks.

Ronna Alexander, Petroleum Marketers Association, addressed the Board. She stated that she recalls instances where sites were deemed eligible with previously closed tanks, based on what was in place before all the regulations went into effect. She suggested researching minutes of the Board to find an example. There were fire codes in place, but they were much less detailed than those in effect now. She suggested deferring this matter until another time.

Ms. Blazicevich stated that she recalls the fire codes requiring a tank to be pumped out, its dispensers removed, and the tank filled with an inert material for it to be closed. There were Fire Marshals enforcing the code at the time. It was not as simple as taking the dispensers off and walking away.

Presiding Officer Cross asked Mr. Bruner if his position is that the procedure for closing tanks is relative to how the Department directed a person to close the tanks in 1985 or before, and that Mrs. Hightower was not directed by the Department to close the tanks in any specific way.

Mr. Bruner clarified, stating that the 1989 rules do not apply to tanks closed before they went into effect. However, the rules say the Department can come back and require an owner/operator to do additional work to bring the closed tank into compliance with the 1989 rules. He respectfully disagreed with Ms. Blazicevich regarding the fire code requirement to fill a tank with inert material. He believes that requirement went into effect in 1989. He is frustrated that the stated reason for denial of eligibility has changed repeatedly. He requested that the site be found eligible.

The Board members discussed postponing action on the matter until a review of the fire codes could be undertaken to determine closure requirements in effect in 1985.

Mr. Noble moved to table the eligibility application. Frank Boucher seconded. **The motion was unanimously approved**.

Cascade Solid Waste District – Fac ID #07-06023, Rel #3011, Great Falls – Eligibility

Mr. Wadsworth stated that the release was discovered during removal of a UST in September 1996. Available evidence indicates that the owner/operator was not conducting release detection at the time. There were no daily manual tank gauging records for the period May 1996 through September 1996. Other tank gauging records were also missing. Therefore the tank did not appear to be in compliance with eligibility laws at the time the release was discovered. The applicable eligibility law is the 1991 version of §16.47.321(1)(b), MCA (Department of Health law that preceded the transition to the Department of Environmental Quality – comparable to §75-11-308, MCA). The law references release detection requirements in ARM 16.45.404 (Department of Health rule that preceded the transition to DEQ - comparable to the current ARM 17.56.407). The staff recommended the release be determined ineligible for the Fund due to the non-compliance.

Joe Murphy, Neil Consultants Inc, addressed the Board on behalf of Cascade County. He stated that the tank was emptied by county staff in 1996, current tank registration was maintained, and the County was never cited with a violation during the life of tank use. In September 1996 the County obtained a permit for removal of tanks. During removal, contamination was observed and reported within 24 hours. He provided a copy of the UST closure checklist. On December 16, 1996, a DEQ staff member requested that the County provide manual tank gauging records for June through September, 1996. The County turned over all the records they could find. Under ARM 17.56.701, release detection is not required as long as a UST system is empty. The system was emptied in May, 1996, and remained empty until the tank was removed. In late December 1996, DEQ determined the facility was in violation of ARM 17.56.407(1), for incomplete inventory control tank release detection methods. In July, 1997 the PTRCB Executive Director notified the County that the site was ineligible.

Mr. Murphy contended that the site was wrongfully cited with a violation, since release detection was not required at the time. Because of the incorrect citation of violations, the site was wrongfully denied eligibility in July 1997. The County

cooperated with all DEQ requirements, including permitting, payment of fees, records maintenance, and immediate notification of the release. He requested that the site be found eligible. In addition, he noted there is precedent to grant eligibility despite missing records, since Kerhagen's Service Inc. was found eligible in the past with missing records.

Mr. Wadsworth commented that the staff is not disputing the fact the County was conducting tank readings. The issue is that the County appeared to be not doing their reconciliation between tank gaugings.

Mr. Murphy believes the issue is that DEQ requested records for the period June through September, and failing to secure those records issued a violation, which was the basis for denial of eligibility.

Ms. Blazicevich explained that, because the daily readings encompassed enough days when fuel was not removed from the tank and the measurement did not change, the 36-hour tank gauging tests were actually being done, though not recorded as such on a separate form. The information from the 36-hour tank gauging tests indicated that release detection requirements were being satisfied.

Mr. Peterson asked why the matter is before the Board now if eligibility was denied in 1997.

Mr. Murphy stated that the original application was made in 1996. The Executive Director issued a letter denying eligibility in 1997 and notified the County that it could appeal the decision. The letter was sent to the County Sanitarian, who did not have the authority to respond and appeal, instead of to the County Commissioner. Some time later the County Attorney took issue with the matter, saying the County had not had an opportunity to appeal the decision. The staff reopened the matter at the time, and told the County to complete a new application and resubmit it to the Board for reevaluation. The County has now resubmitted the application, and believes the violation noted above should not have been cited, since release detection was not required on an empty tank.

Mr. Noble asked what has happened since the tank was removed, and what the extent of the release is.

Mr. Murphy responded that there have been wells drilled and a work plan approved. The release appears to be minor.

Mr. Schumacher moved to reject the staff recommendation based on the fact that tank gauging reports do not indicate fuel was being lost from the system, the measurement did not change so requirements were being met. Mr. Peterson seconded. **The motion was unanimously approved.**

The Board took a 10 minute recess.

Judith Gap Oil – Fac ID #99-95005, Rel #4405, Judith Gap - Eligibility

Mr. Wadsworth provided a summary of the matter. The property is owned by Burlington Northern Santa Fe (BNSF). Judith Gap Oil is the property lessee and tank operator. The release was discovered during an environmental investigation conducted by BNSF. Neither BNSF, its out-of-state contractor, Environmental Management Resources, Inc. (EMR), nor Judith Gap Oil notified the Department of the results of the investigation in the time required under law and rule. DEQ was informed of the release six months after it was discovered. Therefore, the tanks were not in compliance with eligibility laws at the time the release was discovered. The property owner and consultant received a violation letter in November 2005. The operator received a warning letter in 2005.

Tom Bateridge asked for an explanation of the relationship between the Fund and railroads.

Mr. Johnson explained that §75-11-308(2), MCA is an exception under the eligibility statute. The exception says an owner or operator is not eligible for reimbursement for expenses caused by releases from tanks that are, or were, under the ownership or control of a railroad, except for a tank that is operated by a lessee of a railroad in the course of non-railroad operations. Judith Gap Oil is such a lessee.

Presiding Officer Cross stated that many of the bulk plants in Montana are situated next to railroad spurs, because fuel used to be shipped by rail rather than truck. Many of these above-ground systems are more than fifty years old, and oil companies have sold the systems to railroad lessees. Now the railroad is attempting to sell the underlying ground to the lessees, with sometimes heavy-handed methods, leaving the lessees with the cleanup liability.

Earl Griffith, Tetra Tech Inc., addressed the Board on behalf of Judith Gap Oil. This bulk plant is more than 70 years old, adjacent to a railroad line on the edge of town. All the tanks and piping are above ground. In late 2004, EMR visited the site and took samples. Mr. Miller, the owner of Judith Gap Oil, was not aware of their presence on the property. On November 11, 2004, the lab results showed some constituents in excess of the Risk-Based Screening Levels (RBSLs) set

by the State. The Phase II investigation was completed and received by BNSF January 3, 2005. BNSF did not transmit the results to the DEQ until May 2005. DEQ received the report on May 6, 2005. After he was hired by Mr. Miller, Mr. Griffith visited the site in July 2005. He has been unable to complete the work required by the approved work plan, because site conditions did not permit use of the equipment he has available. He will need to wait for more favorable weather and site conditions.

Mr. Griffith is aware that the recommendation for ineligibility is a result of the fact that the release was not called in within 24 hours, nor was seven-day notice sent after receipt of the lab results. However, the lessee/operator did not have those results either, and once he did, he called in to DEQ promptly. Mr. Griffith feels that the operator is being penalized for the actions of the owner, BNSF, and that is inappropriate

Presiding Officer Cross noted that, in his experience, environmental assessment work done by contractors for BNSF is proprietary information that BNSF does not share with its lessees.

Mr. Griffith acknowledged that circumstance seems to be the case here. Mr. Miller was not aware of the release until BNSF notified him in early May 2005. DEQ notified Mr. Miller of the release by certified letter of May 16, 2005 and requested a work plan. In addition, Hinsdale is a small town, and the Millers and their service station are integral parts of the community. If he is not able to secure financial assistance he may not be able to remain in operation. In view of the location of the property, the age of the facility, and the character of the soils, delaying the start of remediation until the eligibility issue has been addressed will not affect the severity of the contamination.

Mr. Noble believes this matter may be misdirected. If BNSF's consultant instigated the work on a voluntary basis, the matter may more properly belong to the Remediation Division's Groundwater Remediation group. This was not triggered by a release discovered through standard operating procedure, but by BNSF's assessment.

Mr. Miller said BNSF notified him of the release and told him it was his responsibility, and to contact DEQ. He did so as soon as possible.

Ms. Alexander commented that a tank owner cannot report something he does not know about. She noted that the rules say, at ARM 17.56.502 and 506, that owners, operators, any person who installs or removes tanks, or the person or entity that performs the investigation needs to report a leak. In this case that would be BNSF or its consultant, not the operator.

Mr. Johnson commented that the analysis must start with the statute. §75-11-308(a)(2) MCA (2003) says there is eligibility for a release from a petroleum storage tank only if the release occurred from a petroleum storage tank that was in compliance with the applicable federal and state rules the Board determined apply. Therefore, to determine eligibility, an analysis needs to be done to see if the tank was in compliance. The Board's ARM 17.58.326(1)(c) refers to DEQ's rules, which is where ARM 17.56.502 and 506 come into play. Once a person or entity takes the step of conducting a subsurface investigation, that person or entity is obligated to report any release to the DEQ.

Presiding Officer Cross then asked if the entity that performed the investigation and found the release, but did not call it in, would be responsible for cleaning up the contamination?

Mr. Johnson said that ownership is a different issue. It was BNSF's responsibility and obligation to report, because they did the investigation. The issue with regard to eligibility is whether a tank was in compliance. In this case the tank was not in compliance because the necessary report was not made. It appears to be BNSF's fault that the tank is not in compliance. BNSF let the matter lie for several months after they had the information.

Mr. Peterson asked if the Board could begin a subrogation action against BNSF if eligibility is granted.

Mr. Johnson indicated that some of the insurance companies the Board has subrogated against are arguing that the Board granted eligibility against its own rules in the first instance, and therefore cannot subrogate those claims against the insurance company.

Mr. Peterson stated that he is not clear that the Board would not be following its own rules in this case.

Ms. Blazicevich recommended that, because the Board believes that the operator/lessee reported the release when he had knowledge of it, the Board should declare the release eligible based on that. Should BNSF take possession of the facility at a later date, because they did not report the release, then the Board should seek cost recovery from BNSF at that point.

Presiding Officer Cross commented that BNSF will likely require that Mr. Miller tear down the facility.

Sandi Olsen responded that Ms. Blazicevich's suggestion is essentially to create a lien on the property rather than declare it ineligible.

Ms. Blazicevich believes there will be many other situations such as this one. BNSF did a Phase II investigation because they intend to do something. Phase II reports are done because there will be a property transfer. BNSF knows they should report the release.

Mr. Griffith noted that, under today's procedures, the equipment used by the old bulk plants and current delivery trucks often does not match very well, resulting in contamination. Mr. Miller has said if the site is eligible he intends to upgrade his facility to more modern equipment. If the site is not eligible, he is likely to go out of business.

Mr. Boucher asked if, in the event the Board grants eligibility, BNSF will view this as a way to avoid having to clean up these sites.

Presiding Officer Cross noted that the forced purchase of the property was exactly how BNSF achieved that goal in his own case.

Mr. Schumacher asked Mr. Johnson if there is any chance the Board can seek recourse against BNSF.

Mr. Johnson replied that he thinks there is. But if eligibility is granted improvidently, then it will be difficult.

Mr. Schumacher asked if the Board can let things sit until things are worked out with BNSF.

Mr. Johnson replied that if the Board does not expend any money there would be no damages, so there would be no legal basis for an action against BNSF.

Mr. Schumacher asked for clarification that the ineligibility recommendation is as a result of lack of notice, even though the lessee notified DEQ promptly upon his knowledge of the release.

Mr. Johnson understands the problem is that the owner went out and did a site investigation, got results, then did not report the results within seven days. This made the tank out of compliance, not the lessee. Because of the actions of the land owner, the tank is in violation.

Mr. Peterson moved to reject the staff's recommendation and grant eligibility to the release based on the actions of the lessee or operator of the facility, recognizing that the owner of the property was in violation of the laws at the time the release was discovered. Mr. Schumacher seconded.

Mr. Johnson clarified that, implied in Mr. Peterson's motion is the fact that the lessee/operator himself notified the DEQ of the release promptly after he found out about it.Mr. Peterson agreed.

Mr. Johnson noted that the problem is §75-11-308(a)(ii), MCA. The specific requirement is that the release must be from a petroleum storage tank that is in compliance, not from a petroleum storage tank whose owner is in compliance. The question of owner and operator is not an issue. In this case the tank is out of compliance because the land owner did not notify the department.

Presiding Officer Cross called for a vote on the motion. **The motion was unanimously approved.**

St Mary Lodge & Resort – Fac ID #18-01907, Rel #4409, St. Mary – Eligibility

The Presiding Officer postponed this matter until the May 1, 2006 meeting to provide additional time for the operator to prepare for eligibility discussion.

Fic's Kwik Six – Fac ID #20-03192 Rel #4378, Drummond – Eligibility

Mr. Peterson notified the Board that he will abstain from this matter.

Mr. Wadsworth indicated that the release was discovered during the removal of old vent piping. The Department was not notified of the lab results within seven days, as required by law and by the closure permit. Therefore the tanks were out of compliance with eligibility laws at the time the release was discovered.

Todd Fickler, Vice President of Fickler Oil, addressed the Board. In response to a question from Ms. Blazicevich, he stated that the vent pipes were not connected to anything when they were removed. They originally were connected to a UST that had been previously removed. He then gave a brief summary of events at the site, as follows. Bill Rule, DEQ UST Section, requested and was granted permission to inspect the facility. He conducted an inspection on October 22, 2003, and provided Mr. Fickler with a list of compliance issues and recommendations on October 27, 2003. A permit to close unused vent lines and extend active vent lines was issued to North West Fuels Systems in July 2004. The work was completed on September 10, 2004. The lab results were complete on September 17, 2004 and received by Fickler Oil on October 25, 2004. When Lawrence Fickler completed the eligibility application, he inserted September 17, 2004, the date on the lab report, in answer to "When did you have knowledge of the release?", even though Fickler Oil did not receive those results until October 24. The lab report also shows the date September 17, 2004 with the word "reported" behind it. Fickler Oil did not know which lab had done the work until the results were received. Mr. Fickler noted that in every past release at any of their facilities, the contractor has taken the samples, chosen the lab, turned in the results, and made the 24-hour call.

Mr. Charlie Vandam of PBS&J was attending in support of Mr. Fickler. He noted that Mr. Fickler's permission to conduct the inspection showed cooperation with the Department and indicates that he did not intend to violate any rules. He also noted that Mr. Fickler and North West Fuels acknowledge a release was not called in to DEQ. He believes there is a question about whether a release actually occurred that should have been reported. The test results, if interpreted properly, do not indicate a release that should have been reported. The vent pipes that were removed extended only one foot beneath the surface and were not connected to anything. Samples were taken from a depth of two feet and showed no evidence of a release until the lab results were received. The site is a commercial facility, with groundwater at a depth of 12 to 15 feet. Once the sample data were received by DEQ, the DEQ determined there was an exceedance of the Risk-Based Screening Levels (RBSLs). He explained that RBSLs are divided into two components, one from the surface to two feet below the surface (surface soil), and the other from two feet below surface and deeper (subsurface soil). The closure sample showed one constituent that exceeded the surface soil RBSL, but did not exceed the subsurface soil RBSL. However, when DEQ requested a work plan, the request included installation of three monitoring wells, clearly intended to address subsurface soil contamination. PBS&J suggested just digging the soil out, but DEQ insisted on a groundwater investigation. The contaminants identified do not show a risk of leaching to groundwater based on the RBSL for subsurface soil concentration. The risk level that was exceeded (i.e. surface soils) indicates the concern should be with direct physical contact with the contaminant, not potential groundwater contamination. He believes, since this is an industrial facility, the subsurface RBSLs should have been used as a threshold to determine if there was a release, and in that case there was not an exceedance and therefore no release to report. No subsurface RBSLs were exceeded; therefore there was not a reportable release, no violation of rule, and no need to investigate groundwater.

Ms. Blazicevich moved to reject the staff recommendation and find the site eligible because the owner of the facility reported the release promptly after he had knowledge. Mr. Schumacher seconded. **The motion was approved, with Mr. Peterson abstaining.**

Hinsdale Conoco – Fac ID #53-06092, Rel #3925, Hinsdale – Eligibility

Mr. Wadsworth presented the Board with a slide exhibiting a bar chart of the PTRCB laws and rules, the DEQ UST rules, the DEQ PRS rules, and the Fire Marshall's rules over time, from 1990 to 2006. He made note that the laws of the various groups change at different times. The staff looks at all that are applicable at the time a release is discovered. The slide is illustrative of why there might be difficulties understanding what laws and rules apply at a particular time, such as the time of the release.

Mr. Wadsworth then presented a summary of the chronology of events at the Hindsdale Conoco site. During a 1995 inspection several violations were noted, including that the tanks were not permanently closed after being out of use for 12 months, there were no tank tightness tests or other leak detection methods used, and there was no automatic line leak detection, all as required by law. He noted that a notice of violation and order to take corrective action was issued in 1997. That notice was still in effect on February 9, 2006. When the tanks were removed in May 2000, two and a half years after the Notice of Violation, the release was discovered and reported.

Mr. Robert Waller, Environmental Resource Management, and Mr. Dave Pippin addressed the Board on behalf of Valley County. Mr. Waller pointed out an error in the executive summary provided to the Board. Two of the tanks are listed as sources of contamination, but the closure reports for those tanks do not state that they were perforated. If they were not perforated, they cannot be sources of contamination. The closure samples from beneath tank 1 are clean. His opinion is that much of the contamination at the site is from tank overfills, dispenser spills and piping leaks.

Presiding Officer Cross asked if the issue before the Board is whether or not Tank 1 was the leak source, or that there is a leak and the proper procedures weren't followed.

Mr. Waller's reading of the executive summary leads him to believe that the issue is the tanks were not emptied. His view is that, though two tanks had a small amount of liquid in them, that fact had no bearing on the magnitude of the release and was not a source of the release.

Mr. Peterson noted that the staff recommended denial of eligibility because there were violations, and tanks that were supposed to be pulled that were not.

Mr. Pippin, Valley County Commissioner, noted that the property has been dormant for a number of years. The man who owned the property has left the country. Valley took it over on a tax deed in early 2005 for public safety. The county is not responsible for any of the contamination, but is now responsible for cleanup of the contamination. The county has drilled some wells on the property. DEQ removed the tanks. He asked where the county goes next if it is not eligible for the Fund.

Mr. Wadsworth indicated this situation has occurred several times, and recommended that counties in this position speak to the legislature about the problem. The staff does not want to encourage owners and operators to run their facilities in an inappropriate manner, then turn over the properties to the county, but the Legislature might be responsive to the Counties' difficulties. In addition, the Department may be willing to work with counties to assist in finding federal money to help in cleanup, such as Brownfields grants.

Presiding Officer Cross suggested Valley County talk to DEQ about postponing any work, if possible. The Board is limited in the amount of help they can provide.

Sandi Olsen, Department Administrator, noted that there is some Brownfields money available for low priority sites contaminated with petroleum. Some applications go through EPA, rather than the Department. She suggested Valley County contact the DEQ staff (Betsy Hovda) for assistance in determining if the site qualifies.

In response to a Board member question concerning site eligibility for LUST, Ms. Olsen noted the main qualification requirements, indicating that this site is not likely eligible for LUST grants, and suggested Ms. Hovda may be aware of other grant programs. She noted there are two grant programs managed by the Department of Natural Resources and Conservation during the legislative session. These are the Resource Development Grants (RDG) or RIT grant programs. RIT is focused on water, with a cap of $100,000. RDGs have a cap of $300,000 and are for environmentally related projects. Applications for those programs are due April 15, 2006, and are acted on during the legislative session.

Mr. Peterson moved to accept the staff's recommendation to deny eligibility to release number 3925. Mr. Bateridge seconded. **The motion was unanimously approved.**

Eligibility Ratification

Mr. Wadsworth informed the Board of the eligibility applications before the Board. (See table below). He noted that there were no recommendations to deny eligibility to be ratified.

Mr. Boucher moved to ratify the eligibility determinations contained in the eligibility table. Mr. Bateridge seconded. The motion was unanimously approved.

Board Staff Recommendations Pertaining to Eligibility
From December 16, 2005 thru Feb 21, 2006

Location	Site Name	Facility ID #	DEQ Release # Release Year	Eligibility Determination – Staff Recommendation Date
Reed Point	Former Reed Point Service Station	60-15009	4440 June 2005	Eligible – No reported violations 12/30/05
West Yellowstone	Westgate Station	16-03734	4448 Oct 2005	Eligible – No reported violations 12/29/05
Glendive	Old Glendive Steam Plant	11-11929	2287 Jun 1994	Eligible – No reported violations 1/3/06
Kalispell	Former Valcon Bulk Plant	15-01678	4402 Mar 2005	Eligible – No reported violations 1/20/06

Table continued. . . .

Kalispell	Noon's #437	15-03915	4392 Jan 2005	Eligible – No reported violations 1/20/06
Kalispell	Noon's 436	15-02331	4393 Jan 2005	Eligible – No reported violations 1/20/06
Billings	Lockwood Water & Sewer District	99-95010	4420 June 2005	Eligible – No reported violations 1/31/06
Polson	DuFord's	24-09481	4441 May 2002	Eligible - No reported violations 1/23/06
Kalispell	City Service West	15-02330	3848 Nov 1999	Eligible – No reported violations 1/24/06
Kalispell	City Service West	15-02330	1608 Apr 1993	Eligible – No reported violations 1/24/06
Broadus	Powder River Medical Clinic	38-00550	1820 Aug 1993	Eligible – No reported violations 2/1/06
Billings	Wells Fargo Bank	56-13972	4426 May 2005	Eligible – No reported violations 2/2/06
Kalispell	Richard Hawk residence	99-95022	4463 Dec 2005	Eligible - No reported Violations 2/09/06

Claims over $25,000

Mr. Wadsworth presented the Board with the claims for an amount greater than $25,000 since the last Board meeting. (See table below). There are seven claims totaling $183,921.00.

Earl Griffith, Tetra Tech, addressed the Board concerning the Noon's claim, #20051215A, noting that the Petro Board staff had noticed unusually large charges for permit and license fees and for dry ice. Tetra Tech discovered that their subcontractor had marked up the items by over 40%, and wanted the Board to be aware that sort of thing happens and to be vigilant.

Mr. Noble moved to accept the claims over $25,000. Mr. Boucher seconded. **The motion was unanimously approved.**

Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Reimbursed
Noxon	Former Bull River Phillips 66	60-15021	20050613A	$28,537.15	$8,546.97
Helena	E Z Stop West	25-01313	20050809C	$25,885.00	$0.00
Great Falls	Double Barrel Café	99-95004	20051213H	$48,085.95	$30,407.95 Co-pay met
Helena	Noon's 422	25-09772	20051215A	$52,104.97	$51,603.33
Great Falls	Elmer's Restaurant	07-03053	20060123G	$33,900.11	$16,950.06
Saint Mary	Hugh Black St Mary Enterprises Inc	18-01907	20060126I	$46,710.50	$46,710.50
Billings	Heights Conoco 13	56-06960	20060127E	$32,137.47	$29,702.19
Total					**$183,921.00**

Weekly Reimbursements

Mr. Wadsworth presented the Board with the summary of weekly claim reimbursements for the weeks of December 28, 2005 through February 22, 2006 for Board ratification. (See table below). There were 268 claims, totaling $972,817.21. He also noted that there were three claims that were denied in their entirety because they were withdrawn.

Mr. Schumacher noted that Big Sky Standard appeared repeatedly during this time period, for a total of $288,000, and most of the claims were just under the $25,000 limit for claims to be reviewed by the Board. He noted that the costs were likely for excavation.

Presiding Officer Cross noted that, with the $288,000 for excavation, the total amount spent at the site is approximately $530,000 over fifteen years. This breaks down to $250,000 to study the site for fifteen years and $288,000 to clean it up over a period of about two months. It seems to him that doing the dig-out first and monitoring afterwards would be more cost effective.

Presiding Officer Cross noted that between the weekly reimbursements listed and the claims over $25,000 just ratified, the Board has spent $1.2 Million, and not a single site has been closed. He feels this cannot continue.

Mr. Schumacher moved to approve the weekly claim reimbursements. Ms. Blazicevich seconded. **The motion was unanimously approved.**

WEEKLY CLAIM REIMBURSEMENTS March 6, 2006 BOARD MEETING		
Week of	**Number of Claims**	**Funds Reimbursed**
December 28, 2005	28	$67,550.83
January 4, 2006	25	$52,757.08
January 11, 2006	26	$35,501.26
January 18, 2006	16	$138,218.34
January 25, 2006	20	$141,268.53
February 1, 2006	38	$163,975.69
February 8, 2006	40	$149,356.41
February 15, 2006	48	$151,347.99
February 22, 2006	27	$72,841.08
Total	**268**	**$972,817.21**

Fiscal Report

Mr. Wadsworth presented the Board with the current Fiscal Report. He noted that, based on past experience, he anticipates there will be approximately $120,000 left in the 2006 accrual at the end of the fiscal year.

On the financial report, Mr. Schumacher noted that the revenues expected for the year include $800,000 in one-time miscellaneous revenue, not from the MDT fee. If that number is not included, the Board will end the year almost $300,000 in the red. He emphasized that the Board must continue to be cautious and get back to the point where claims and expenses do not exceed revenues.

Mr. Wadsworth also noted that the Board has an April court date that will affect the projected contracted services expenses.

Board Attorney Report

Mr. Johnson noted there are no changes on the report (see table below) other than the Town Pump Dillon matter that was addressed earlier in the meeting.

Presiding Officer Cross thanked Mr. Johnson for his advice to and efforts on behalf of the Board.

Location	Facility	Facility # & Release #	Disputed/ Appointment Date	Status
Boulder	Old Texaco Station	22-11481 Release #03138	Eligibility 11/25/97	Dismissal Pending because cleanup of release completed.
Thompson Falls	Feed and Fuel	45-02633 Release # 03545	Eligibility	Case was stayed on 10/21/99.
Eureka	Town & Country	27-07148 Release #03642	Eligibility 8/12/99	Hearing postponed as of 11/9/99.
Helena	Allen's Oil Bulk Plant	25-01025 Release #02893	Eligibility 11/29/99	Case was stayed on 1/21/00.
Butte	Shamrock Motors	47-08592 Release #03650	Eligibility 10/1/99	Case on hold pending notification to Hearing Officer.

Table continued . . . .

Whitefish	Rocky Mountain Transportation	15-01371 Release #03809	Eligibility 9/11/01	Ongoing discovery. No hearing date set.
Lakeside	Lakeside Exxon	15-13487 Release #03955	Eligibility 11/6/01	In discovery stage.
Helena	Noon's #438	25-03918 Release # 03980	Eligibility 2/19/02	Case stayed.
Belt	Mary Catherine Castner	07-12039	Eligibility 11/22/02	

Board Staff Report

Mr. Wadsworth presented the Board staff report showing that 84 eligibility applications were received during the past twelve months. 43 were eligible, 2 were ineligible, and 39 are pending. The number of claims received in the past twelve months is 1537 and the number reimbursed is 1534.

The AST work group has not met since the last Board meeting. There were two Fund Solvency Committee meetings. The matters the committee is evaluating are Risk Based Corrective Action with regard to the non-degradation rule, site closure guidance and procedure, lab analysis costs, groundwater monitoring costs, indoor air quality sampling, area management, mileage restrictions, and examining cost reduction methods used by other states. Suggestions on reduction of lab costs center around reducing the number of constituents tested and the Board contracting with a lab for a discounted charge. ASTs and heating oil is being left to the AST work group to discuss at this time. Mr. Wadsworth drew the Board's attention to the Corrective Action tables in the packet. In the period January through November, there were 16 more plans reviewed in 2005 than in 2004. The value of plans reviewed spiked in April. There is approximately $450,000 more work proposed in 2005 than in 2004.

Petroleum Release Section Report

Mr. Trombetta noted that the majority of new releases are caused by human error, which tends to be smaller releases. The Department is working on 1200 sites, mostly large, old releases. Getting sites to closure is still a challenge, as a result of the non-degradation rule.

The Department is working on better communication with regard to site closure procedures and information.

He announced the next consultants' meeting scheduled for March 27, 2006 at 10:00 am.

Public Forum

Mr. Griffith spoke to the Board about low-flow sampling. He has been pleasantly surprised that it appears to be a method that works well and could result in cost savings. If this method gets a site to closure sooner, it is well worth the extra cost of the pump.

He then described his experience with a requirement for indoor air sampling, and the pitfalls he noted from that experience.

The next scheduled Board meeting is May 1, 2006, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, MT.

Meeting adjourned at 3:01 p.m.

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Greg Cross - Presiding Officer